IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~310~~ 309

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Respondents,

against

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, etc., et al.,

Defendants-Petitioners.

CROSS-PETITIONERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 372 F. 2d 155 and is reprinted in Appendix A of the defendants' Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pages 1a-27a. The opinion of the District Court for the Southern District of New York is reported at 241 F. Supp. 865 and is reprinted in Appendix B of said Petition, pages 28a-82a.

Jurisdiction

The judgment of the Court of Appeals was entered January 30, 1967. On April 26, 1967, Mr. Justice Harlan entered an order herein extending the time to file Petition for certiorari and the Cross-Petition to June 30, 1967. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(a).

Questions Presented

The questions presented by cross-petitioners are set forth in the Cross-Petition, pages 2-7. The first question presented by petitioners (P. p. 2) is irrelevant, since it *assumes* what the record contradicts, *i.e.*, that petitioners did not combine with non-labor groups

Counterstatement

Most of the relevant facts have already been set forth in the Statement contained in the Cross-Petition. However, erroneous and tendentious fact allegations contained in the Petition require correction or clarification.

There are more than 200 AFM Locals (out of the total of 680) which have orchestra-leader-employers *as officials, many of them elected officials.* At the most recent AFM Convention (June, 1967), there were in attendance as union delegates many leader-employers.

Leaders operate in every State of the Union, and in and from every important city thereof. There are in the AFM some 5,000 full-time professional orchestra-leader-employers.

Cross-petitioners estimate that there are some 400 professional orchestra-leader-employers in Local 802. However, out of the total of 400 professional orchestra leaders

in Local 802, less than 40 do enough business to meet NLRB jurisdictional "yardsticks". On a minimum average, each of these 400 professional orchestra leaders regularly employs 5 key or "first-string" sidemen. Allowing for some degree of overlapping of employment of the same sidemen by different leaders, there are between 2,000 and 2,500 active employee musicians in Local 802. Out of a total membership of 30,000 in Local 802, less than 5,000 are functionally and regularly incardinated in the industry. The rest, numbering approximately 25,000, play engagements occasionally, some very rarely, some not at all. Of the 30,000, not more than 1,500-2,000 are employed on *steady engagements.* The rest are in the single engagement field. The professional leaders work both single and steady engagements.

Single engagements and steady engagements comprise the entire field of musical engagements. Steady engagements number less than 2% of all musical engagements. The Local 802 "Price Lists" (*e.g.,* Plaintiffs' Exhibit 366, pp. 5-8) give an exhaustive roster of *single* and *steady* engagements, differentiating between the two. That list shows about 100 types of single engagements (most of which cross-petitioners and the class represented by them are qualified and seek to play). About 90 of these types of single engagements are neither "club dates" nor steady engagements.

The complaints here were not confined to "club dates". Cross-petitioners challenged the right of unions to fix prices in both the single and steady engagement fields; that is to say in the entire field of musical engagements.[1] Nothing in the complaints or record suggests that the cross-petitioners' attempt to prohibit lawful union regula-

[1] Petition (hereinafter abbreviated "P."), pp. 2-3: "The Court of Appeals * * * held that petitioning unions may not determine the price which their member, a musician known as a leader, must charge to the purchaser of the music on certain engagements known as 'club dates'."

tions designed to protect the jobs and wage standards of employee members (P. p. 2).

The description[2] given in the Petition is a travesty on the real situation. Professional orchestra-leader-employers like plaintiffs have established businesses; have their own offices; often have office employees; and always have a nucleus of key employee-musicians whom they *regularly* use. As Judge Levet found, they organize their own bands; maintain and pay steady and part-time employees; acquire business as a result of their own contacts, reputation and personal solicitations; engage in and pay for advertising. Their names are prominently displayed wherever their orchestras perform; they negotiate and sign contracts of engagement with their clients, the purchasers of music; they usually lead or conduct their own orchestras; they appoint subleaders to lead them, when they do not do so themselves. They decide how their orchestras are to render their pieces; choose the tempo and decide the dynamics, tone coloring, volume, syncopation, if any, and other characteristics of the musical styles of their orchestras. They decide, subject to union minimum requirements, on the number and qualifications of sidemen who play in their orchestras. They call for rehearsals, when necessary; train employees in those rehearsals; correct and discipline sidemen; and devote their full time to their profession as orchestra leaders. Most of them *never* serve as sidemen; a few do so rarely, usually as an accommodation to a fellow orchestra leader. They pay all expenses connected with performances by their orchestras, including sidemen's salaries, uniforms (if any), mileage fees, cartage fees, food and lodging, sheet music racks, special arrangements of

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[2] "Normally the purchaser of the music * * * approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the 'leader', who obtains the other musicians who perform the engagement. * * *" The "leader" who "becomes" such for a particular engagement is not a full-time, professional orchestra leader; and he is not in the class represented and typified by Cross-Petitioners.

music to be played by their orchestras, etc. The difference between the prices they charge and their expenses constitutes their profit. They always pay for workmen's compensation, unemployment insurance, etc., coverage of their employees, unless the AFM or 13 Locals interfere by *requiring particular purchasers of music* to assume these obligations under threat of union reprisals.

The casual and preposterously inadequate manner in which petitioners depreciate orchestra-leader-employers suggests the advisability of quoting relevant statistics from the Bureau of Census, U. S. Department of Commerce. The Bureau's classification of "Dance Bands, Orchestras, except Symphony" includes "dance bands, orchestras, combos, quintets and similar instrumental organizations, presenting popular music on a contract or fee basis for private dances, restaurants, nightclubs, radio and television programs, etc." The latest figures available are for 1963. The total number of such instrumental organizations for that year was 5,118. Of this total, 4,999 were operated by "Active proprietors of unincorporated businesses." The gross income or receipts of these dance bands and orchestras was $86,323,000 for the year 1963; and their total payroll for the same year was $48,237,000.

For the year 1958 (the next earlier year for which Commerce Department figures were available), the total number of dance bands and orchestras was 6,750. Of this total, the number of controlling "Active proprietors of unincorporated business" was 5,582. The gross income or total receipts of these bands and orchestras in 1958 was $82,369,000; and the total payroll was $40,194,000.

Thus, the number of orchestras and bands *decreased* from 1958 to 1963. That decrease has continued to the present time according to the experience of cross-petitioners, because of the restrictive commercial practices of petitioning unions. If anything, the rate of decrease accelerated from 1963 to 1967.

The Bureau's "Standard Metropolitan Statistical Area" (SMSA) for the 1963 statistics included New York City, Nassau, Rockland, Suffolk and Westchester Counties in the State of New York. The "Dance Bands, Orchestras, except Symphony", in that area for 1963 numbered 450 in all. Of these 415 were "Active proprietors of unincorporated businesses". The total receipts of these New York dance bands and orchestras was $25,697,000; and their total payroll was $13,100,000.

The 1958 figure was complicated by reason of the fact that the "Standard Metropolitan Statistical Area" for that year included, in addition to the New York State counties named above, the following counties of the State of New Jersey: Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union. For this larger statistical area, the Department of Commerce figures for 1958 showed 587 dance bands and orchestras, of which 528 were "Active proprietors of unincorporated businesses". The total receipts of all of the dance bands in this extended area were $17,082,000 in 1958; and the payroll was $7,998,000.[3]

It appears from the foregoing that the musical industry (excluding theatre, symphony, radio and television portions thereof in which only a minuscule number of orchestras and musicians play) is characterized for the most part by small, independent employers (professional orchestra-leader-employers). These have allowed their negotiation rights to be usurped by AFM Locals (usually the Executive Boards thereof) and by certain leader-employers who are union officials or union collaborators for the purpose, among other things, of aiding unlawfully assisted AFM unions and for the purpose of creating and enforcing union-prescribed wages and working conditions; since collective bargaining, and other rights pro-

[3] The foregoing material and statistics were furnished by Harvey Kailin, Chief, Business Division, Bureau of Census by letter dated August 4, 1967.

tected by NLRA, are unknown in the largest area of this industry.

Most of the orchestra-leader-employers in the industry cannot meet NLRB jurisdictional standards. The figures supplied by the Bureau of Census, quoted above, show the average income of the dance bands and orchestras for the year 1963 was about $16,000. Moreover, as contrasted with other industries where the Board has declined jurisdiction or where the act expressly precludes Board jurisdiction, employer-employee-union relationships in the musical industry are exempt, under the doctrine of preemption, from State regulation.

Local 802 does have members who are more or less regularly sidemen, but who on infrequent occasions (1-10 times a year) desert their status as sidemen in order to improvise as "leaders". Some 90% of the persons who, as AFM and Local 802 members, file engagement contracts with the latter union are just such *occasional* "orchestra leaders". However, *they are not professional leaders in the class claimed by cross-petitioners or plaintiffs; they do not, like plaintiffs, earn all or a substantial portion of their livelihoods from serving as orchestra leaders;* they have no organizations with reputations as such. Plaintiffs (and other orchestra-leader-employers like plaintiffs) are not to be placed in the same category as this vast majority of "leader"-members, whose earnings from service as "leader" are negligible each year. Such "leaders" do not *regularly* constitute a "non-labor group"; even though they *occasionally* act as independent contractors. Courts and Boards have never found any difficulty in categorizing persons like plaintiffs as true employers. The District Court's decision was the very first which ever placed *employers* in a "labor group".

> *Cutler* v. *AFM,* 231 F. Supp. 845 (affirmed 316 F. 2d 546, certiorari denied 375 U. S. 941 (1963));

Carroll v. *AFM*, 206 F. Supp. 463 (affirmed 316 F. 2d 574 (1963));
Cutler v. *United States*, 180 F. 2d 360;
Bartels v. *Birmingham*, 332 U. S. 126 (1950);
Associated Musicians, Local 802 and Ben Cutler, 164 N.L.R.B. No. 8;
American Federation of Musicians, Don Glasser and George Doerner, 165 N.L.R.B. No. 110;
Republic Productions and Chicago Federation of Musicians, 153 N.L.R.B. No. 11.

Petitioners also misrepresent the price ingredients which they prescribe in their bylaws.[4] The minimum prices mandated by defendant unions were never merely "the aggregate of the minimum compensation of sidemen and leaders." See Plaintiffs' Exhibit 388, where petitioners *admitted* that the following are the union-required, indispensable ingredients of their unilaterally imposed minimum prices for muscial engagements: (1) The involved wages of employee-musicians; (2) cost (which always includes higher profit to the orchestra leader) of complying with the minimum-number-of-musicians unilaterally mandated for the particular place of engagement by the Local 802 Executive Board (and published in the Local 802 "Minimums Book"); (3) minimum "leader's fee" unilaterally fixed by defendant unions (as the orchestra-leader-employer's minimum income or profit); (4) "minimum mileage fees" unilaterally fixed by defendant unions which leader-employers *must* charge their clients; (5) 8% price addendum (formerly 7%) required by the Local 802 Price List, as further *minimum income to orchestra-leader-employers;* (6) minimum cartage charges which orchestra-leader-employers *must* charge clients; (7) cost of uniforms, where uniforms are required; (8) cost of transportation,

[4] P. p. 5: Petitioners speak of union regulations which "require the leader to charge the purchaser of the music a minimum price which is not less than the aggregate of the minimum compensation paid to sidemen and leaders."

according to certain transportation standards unilaterally fixed by defendant unions; (9) cost of food and lodging; and (10) 10% traveling surcharge (effective to January 1, 1964 and enforced by defendants for more than a year afterwards) where the engagement was played outside the home local's jurisdiction. Since January 1, 1964, petitioners have attempted to maintain the 10% differential under a price addendum with a different name: "Musical Engagements Wage Differential" (Article 15, AFM Bylaws).

Obviously, many of the 10 items just listed are not *compensation* for either sideman or leader who, as an employer, derives a *profit*, not *wages*, from his engagements.

Cross-petitioners Carroll and Peterson were, despite misstatement in the Petition (P. p. 6, footnote 6), expelled from defendant unions for reasons related to this litigation. See *Carroll* v. *AFM*, 206 F. Supp. 462, reversed by divided opinion, 310 F. 2d 325 (C.A. 2, 1962). The District Court clearly found that Carroll and Peterson were expelled as a reprisal for the institution of the instant antitrust suits; and the Court of Appeals, in reversing, did not disturb Judge Levet's findings of fact in this respect.

Summary of Argument

The Court below did not find cross-petitioners to be members of a "labor group". The record demonstrates that petitioning unions enforced their bylaws (requiring minimum prices, suppression of competition and other monopolistic practices) in combination with various non-labor groups.

No instance of competition between cross-petitioners as "working employers" and employee-musicians appears in the record. Cross-petitioners are "working employers" only in the sense that *all employers perform work characteristic of their employer status*—work which is a prerequisite to an employer's ability to supply jobs and to pay wages. The references in the decisions of the courts

below to "job and wage competition and other economic interrelationship" are irrelevant since they concern non-professional "orchestra leaders" who irregularly and only occasionally "organize" and "conduct" orchestras. They do not pertain to full-time professional orchestra leaders in the small class represented by cross-petitioners. Further, such references are unreasonable expansions of union rights and powers, based upon erroneous, exaggerated interpretation of this Court's *dictum* in the terminal paragraph of the *Los Angeles Meat Drivers* case. Ninety-five percent of all AFM members who file engagement contracts as "orchestra leaders" perform as such less than 10 times a year. They do not earn their livelihoods from functioning as "orchestra leaders". They are really sidemen or employee-musicians by profession rather than veritable professional orchestra leaders who are either *employers* or independant contractors. To take the said diffuse *dictum* from this Court's *Los Angeles Meat Drivers* case *literally* would be to subject *all employers* as well as employees to union organizing drives; because there is always *some* "economic interrelationship" between employees and employers in every industry.

In any event, price-fixing imposed upon a whole industry, whether effectuated by unions acting alone or by unions in combination with non-labor groups (as here), is violative of the antitrust laws.

ARGUMENT

POINT I

The Court below did not find cross-petitioners to be members of a labor group; and petitioners' suggestion to the contrary is error.

Misreading the decision of the Court of Appeals, petitioners aver that the Court below had found orchestra-leader-employers *to be members of the "labor group"* (P.

pp. 3, 4, 7, 8, 9, 10, 11). Nowhere in its decision did the Court of Appeals aggregate leader-employers to a "labor group". That Court eschewed all discussion of "labor group", or "non-labor group", because it did not think *Allen-Bradley* applicable.

POINT II

The record demonstrates that petitioning unions enforced their minimum price and other commercially restrictive union bylaws in combination with various non-labor groups.

Because petitioners include in their membership many orchestra-leader-*employers,* they *are* in effect, and to some extent *function* as, *an association of independent and otherwise competing entrepreneurs and employer-businessmen* who use the association to further their own purposes or interests of preventing free competition at prices below those fixed by petitioning unions; who actively participate in union policy making; and who enforce monopolistic policies which injure the public as well as the cross-petitioners. Thus, association of leader-employers with petitioning unions involves combination and agreement between them concerning prices of, and employer profits from, musical engagements.

Petitioners' "Form B" contract sets forth, among other things, the minimum *price* (no matter how disguised as "wages") which Union bylaws require the orchestra leader (whether employer or independent contractor) to observe. A purpose or effect of the "Form B" contract and the Union's mandate that it be filed is the elimination of price competition between orchestra-leader-employers and between booking agents.

The combination or agreement between petitioning unions and associated leader-employers and leader-inde-

pendent-contractors has resulted in the making and application of many arbitrary rules unreasonably restricting commerce and governing the number of musicians required for particular engagements. Many leader-employers, for example, who subscribe to and enforce such employment-quota rules, act in their own immediate interests; because thereby they increase the *minimum price* (which the purchaser must pay) and proportionately their own *minimum profit.* The leader-employer must receive the 8% addendum or "surcharge" prescribed by Local 802 bylaws. The higher the price of the engagement because of employment-quota rules, the higher the surcharge[5] paid to the leader-employer. If, in addition, the engagement is for a *traveling orchestra,* there was the former 10% traveling surcharge and there is now the 10% "traveling orchestra wage differential", as prescribed in the different versions of Article 15 of the AFM Bylaws before and after January 1, 1964.

All of these arbitrary union bylaws (which restrict competition and fix prices) are enforced against orchestra leaders and the public by petitioning unions in combination with many types of employers, including the associated leader-employers who are union members and booking agents, who, generally, are not union members. The sanctions prescribed in the AFM bylaws and the Local bylaws are fines up to $5,000, suspension and/or expulsion. The consequence of expulsion is the effective removal of the penalized leader-employer or leader-independent-contractor from competition in the business of furnishing live musical services.

Thus, petitioners and the associated orchestra-leaders and licensed booking agents by their agreement, combination or conspiracy have monopolized trade and commerce

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[5] If the total wage of 5 musicians is $250 and for 10 musicians is $500, then eight percent of $250 is $20; while 8% of $500 is $40.

in the musical industry by various practices, actions and methods, including:

(1) Promulgation and enforcement of union rules, and institutionalization of union practices, which required all orchestra leaders to be members of AFM and of the very Locals which organized their employees.

(2) AFM has promulgated bylaws approved and enforced by Local 802, by numerous union-member-leader-employers and by booking-agent-employers, which require all booking agents to obtain a license from the AFM to book musicians and operate as such. Said union laws require booking agents to sign the so-called Booking Agent Agreement, which provides that AFM may prescribe the terms and conditions of any contract between a booking agent and an AFM member; and which prohibits booking agents from arranging employment of non-members or of any musician in violation of the bylaws of AFM and its Locals (including those which restrain trade and commerce and which fix minimum prices).

(3) The petitioning unions, the associated leader-employers, the associated independent-contractor-leaders, and the licensed booking agents approve and enforce universal use of the "Form B" contract, which incorporates by reference the constitution, bylaws and regulations of AFM and of all AFM Locals (including those which fix prices and restrain competition).

(4) Petitioning unions and the said associated orchestra-leaders and booking agents approve and enforce use of boycotts, usually by *unfair lists,* which name (i) purchasers who make use of the services of leaders or other musicians who are not AFM members or who allow leaders to perform upon the basis of contracts not approved by the involved AFM Local or upon the basis of contracts other

than the "Form B" contract prescribed by Article 13 § 33 of the AFM Bylaws; (ii) orchestra leaders who are expelled or suspended and boycotted; (iii) booking agents whose AFM licenses have been suspended or who are boycotted; (iv) hotels, dance halls, restaurants, caterers who tolerate musicians who are not union members in good standing or who tolerate purchasers like those described in item (i) *supra*. No AFM member is permitted to play an engagement for any purchaser, orchestra leader or booking agent on the unfair list; and no booking agent is permitted to contract for such purchaser or orchestra leader. The unfair list is published regularly in the International Musician and in the official publications of the various AFM Locals.

Thus, the claim that petitioning unions do not conspire or combine with non-labor groups is groundless; because petitioning unions' activities are not "independent" (P. p. 12); and even if there were no actual *conspiracy*, there was certainly *combination* with non-labor groups to fix and enforce prices, to create business monopolies and to control the marketing of services (P. p. 7). In addition to the combination with leader-employers who willingly or under duress enforce Local 802 minimum *prices*, there is combination or contract with the owners of hotels, nightclubs, restaurants and with caterers to enforce *wages* and other restrictive union regulations against leader-employers who were not privy to the making of such contracts or combinations. The lessees and guests of hotels, nightclubs, restaurants and catering establishments are also constantly told that Local 802 minimum *prices* and other union rules must be enforced; and the ensuing contracts, whether written or oral, constitute agreements or combinations between labor and non-labor groups to furnish the predicates for Sherman Act violations (P. p. 10).

POINT III

The record exhibits no instance of competition between *working employers* and sidemen or subleaders who are members of petitioning unions; and, in any event, no cross-petitioner is a working employer in the sense of working as a sideman or a subleader.

Petitioners, with manifest hyperbole, claim that the Court below "has nullified the right of unions to protect their employee members from evasion of union wage standards by competition from working employers * * *" (P. p. 12). In this connection, petitioners rely on *Milk Wagon Drivers* v. *Lake Valley Products,* 311 U. S. 91. However, in that case, the so-called "independent contractors" were really *employees* and were actually designated as such in the labor contracts between the involved employer and union.

Petitioners also lean on *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769 (1942). In that case none of the so-called "independent contractors" was an *employer.* Each had originally been an employee working for the same bakery wholesaler whose products they sold afterwards as alleged independent contractors. If they were genuinely "self-employed", they may have been in a "labor group". But the case itself made no ruling on that point. It turned on an unconstitutional curtailment of speech by a State court injunction. Also, the case came *five years before the Taft-Hartley Act,* which in the language of the House Conference Report No. 510 on H. R. 3020 expanded § 8(b)(4) to prevent "concerted activity by a union or its agents to compel an employer or self-employed person to become a member" (p. 45).

Teamster Union v. *Oliver,* 358 U. S. 283, concerned *wages,* not "price-fixing", as the decision itself pointed out at page 294.

Meat Drivers Union v. *U. S.*, 271 U. S. 94, held that *independent-contractor* grease peddlers, who did exactly the same kind of work as *employee* grease peddlers were not properly members of the employees' union. *A fortiori,* orchestra-leader-employers (who are genuine employers of many employees during the course of a year) have no proper place in the same union which has organized their employees; especially since their work as leaders is different from that of employee musicians.

Senn v. *Tile Layers Union,* 301 U. S. 476, was nullified by Congressional amendment, the Taft-Hartley Act, §§ 8 (b)(4)(A), as the involved Conference Report (No. 510, 80th Congress, First Session, House of Representatives) demonstrates.

The record shows no competition whatever between any cross-petitioner and any sideman, or between any professional orchestra-leader-employer (the only type of person represented by petitioners) and any employee musicians. No cross-petitioner works as a sideman.

We will have taken a long step in the direction of tyranny and unequal protection of law if, by statute or by case law, *an employer's right to work as such* is not regarded as at least on a par with the employee's right to work as such; or if it is subjected to the pretentions to power of labor union leaders or is sacrificed to some strange idol of the primacy of the workers' right to work. The employer's right to work as an employer is, in principle, as valid as the right to work as employees. In economic appraisal, it is more valuable; since the employer's work makes jobs possible for employees. Unless the employer can enjoy the right to be a working employer (*i.e.,* to do the work which an employer needs to do and which brought him to the status of an employer, capable of supplying jobs) is protected against the arbitrary suppression of union leaders, the employer's ability to provide jobs is either lost or gravely curtailed.

Most orchestra leaders who reach the stage where they can make a profession of leading orchestras do so upon the basis of their virtuosity *as a leader who leads while playing an instrument.* To deprive them of the opportunity to lead in this fashion and of the instrument of leadership is to rob them of the key to their success.

This discussion concerns only *professional* orchestra leaders; that is to say orchestra leaders like cross-petitioners who earn their livelihoods as such and who rarely, if ever, work as sidemen. (When they do so, once or twice a year, it is usally as an accommodation for a fellow orchestra leader.) Ninety-five percent of so-called "orchestra leaders" work as such only occasionally and not professionally. This discussion does not involve that 95%, who are unable to earn their livelihoods as orchestra-leader-employers.

Many *collective bargaining agreements* (there is no such agreement here) limit the performance of *production work by foremen* or *supervisory employees.* Foremen who work take work from rank-and-file union members. Leader-employers do not take work from, they supply work to, employee musicians. Moreover, the employers who negotiate the "many agreements [which] limit the performance of production work by foremen" are not coerced into union membership. Nor is it correct to state (as do petitioners) that the provisions concerning working foremen "are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members." A more correct statement is these provisions are inserted to prevent persons from doing work which the union and the employer *agree* should be done only by persons in the bargaining union unit.

In *NLRB* v. *Borg-Warner Corp.,* 356 U. S. 342 (1958), this Court held that neither the "ballot clause" (a contract proposal made by employer to the effect that there

could be no strike unless the employees were first balloted on employer's last proposal) nor the "recognition clause" (an employer's proposal that the Local union rather than the International be recognized, despite certification of the International) came within the ambit of the statutory phrase: "wages, hours and other terms and conditions of employment." Therefore these two clauses were not mandatory subjects of bargaining. *A fortiori,* an employer's right to work *as an employer* is *not* a matter that comes within the statutory designation "wages, hours or other terms and conditions of employment." Therefore, the Court of Appeals was correct in holding that an orchestra leader's right to lead by playing his instrument is not a mandatory subject for collective bargaining.

POINT IV

The references in the decisions of the Courts below to job and wage competition and other economic interrelationship between musicians who perform as leaders on club dates and other musicians admittedly employees are irrelevant; since they refer not to professional orchestra leaders like petitioners but to 95% of all AFM members who perform at one time or another as "orchestra leaders," but who are not professional orchestra leaders.

Petitioners frequently refer to the large number of occasional, non-professional orchestra leaders who do not derive their livelihood or any substantial portion of their livelihood from functioning as orchestra leaders. The instant cases concern professional full-time orchestra leaders like cross-petitioners, who derive their livelihoods from their profession. Non-professional "orchestra leaders" perform only 10% of the musical engagements for which contracts are filed with AFM Locals; while professional orchestra leaders like cross-petitioners, who number less than 5% of all orchestra leaders filing contracts, contract

for 90% of all musical engagements. (See Defendants' Exhibits, J, K, L and M.)

Petitioners themselves admit that (p. 4): "A considerable number of musicians act only occasionally as leader, and act as sidemen the rest of the time, competing with each other and with full-time leaders for engagements." Cross-petitioners are, of course, not concerned with this considerable number (about 95%) of "leaders". There is not a jot of evidence in the record to show that full-time professional orchestra leaders like plaintiffs[6] ever competed with any member of the large group of occasional leaders *for engagements*. Purchasers of music are not generally attracted by the unreputed, occasional "leader" who in a sporadic, desultory fashion acts as such a few times a year.

POINT V

Price-fixing whether effectuated by unions alone or by unions in combination with non-labor groups is violative of the antitrust laws.

Cross-petitioners have been unable to find any case which ever validated the attempt of a union, whether acting alone or in combination with non-labor groups, "to enforce illegally fixed prices" for an entire industry.

(1) In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), this Court read the Sherman Act as designed to prevent "restraints to free competition in business and commercial transactions which tended to restrict production, *raise prices*, or otherwise *control the market to the detriment of purchasers or consumers* of goods and services * * *." (Emphasis added.) That case according to Mr. Justice

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[6] It is erroneous to state or suggest that cross-petitioners have conceded that "in other parts of the music industry * * * the leader is concededly an employee" (p. 4).

Stone was *not* a case "of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices." In the instant cases, however, many leader-employers (all those who comply with and enforce petitioning unions' fixed prices) use AFM and its Locals as means for suppressing competition and for enforcing minimum prices. Whether the unionized employers *make use of the union* to suppress competition and to fix prices or whether the union *makes use of the unionized employers* to suppress competition and fix prices, the detriment to purchasers of musical services is the same in each case; as is the Sherman Act violation.

In *Apex* this Court recognized that there *is* an intimate economic relationship between wages, hours and working conditions on the one hand and prices on the other; but this incidental and inevitable effect of *collective bargaining agreements* on commercial competition was free of antitrust liability (*Apex* case, at 503-04, 504 n. 24). In the instant cases, petitioners never engaged in collective bargaining with orchestra-leader-employers. Thus *Apex* (at pp. 503-04, 504 n. 24) is unavailable to excuse or justify petitioning unions' conduct here; because they did combine with management (*e.g.*, many orchestra leaders and booking agents) in eliminating competition from the commercial market for musical services. That is why both the facts and the rule of the later *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, are applicable here; even though the *facts* and *rule* of that case are not precisely consistent.

(2) In *U. S.* v. *Hutcheson*, 312 U. S. 219 (1941), this Court directed its attention to the question "Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman law * * *." There is here no controversy with a rival union; and petitioning unions do not use "conventional," peaceful activities.

Petitioners here engage in a crude conspiracy to drive out of business those leader-employers who refuse to abide by union prices. This was unlawful long before 1890; and it has been unlawful ever since. Such union conduct is not exempted from the antitrust laws and should not be. This is merely using "wages, hours and working conditions" as a pretext for flagrantly violating the Sherman Act and as a shield for acquiring undeserved protection from clear liability. Petitioning unions prate of collective bargaining to preserve wages, hours and working conditions, while they baldly repudiate collective bargaining.

(3) *Allen-Bradley Co.* v. *Local Union No. 3* (325 U. S. 797 (1945)), answered affirmatively the question "whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods". Cross-petitioners rely heavily on the rationale of this case.

(4) The landmark case intervening between *Allen-Bradley* and *Pennington*[7] is the *Los Angeles Meat Drivers*[8] case. So far as its actual ruling was concerned, it is a precedent aiding cross-petitioners. But petitioners have made industrious and paralogistic use of the concluding *dictum* in that case. Petitioners give such literal and paramount scope to that *dictum's* "job and wage competition and other economic interrelationship" formula, as would make every decision of management subject to mandatory collective bargaining! Such inordinate expansion of labor-union interest is manifestly unreasonable and opposed to Congressional intent.

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[7] 381 U. S. 657 (1965).

[8] 371 U. S. 94 (1962).

In *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), Mr. Justice Stewart had occasion (in his concurring opinion) to inveigh against such unreasonableness:

> "* * * Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative.
>
> "* * * An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the committment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.
>
> * * *
>
> "This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects

of compulsory collective bargaining under the present law.'"[9]

(5) Next came the important *Pennington*[10] and *Jewel Tea*[11] antitrust opinions of this Court. The following quotation from the text of an address delivered by Professor Milton Handler of Columbia University Law School at the AFL-CIO Industrial Department Lawyers Conference (November 19, 1965) accurately summarizes the rules of those cases:

> "Taken together, the opinions of Mr. Justice White, who wrote for a majority of the Court in *Pennington* and for two of his brethren in *Jewel Tea,* add up to this: a union is exempt from the operation of the antitrust laws only if its conduct satisfies two standards. First, it must act 'unilaterally' in the pursuit of its own self-interest, rather than 'at the behest of or in combination with non-labor groups'. Second,

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[9] Apparently Mr. Justice Stewart found it necessary to disclaim the idea that the duty to bargain extended to such matters as advertising, product design, financing, etc., because of the Solicitor General's brief in the *Town and Country* case, wherein can be found the following strange statement: "It may be objected that the literal reading would give labor unions a statutory right to bargain about a host of subjects heretofore regarded as 'management prerogative', including prices, types of product, volume of production and even methods of financing. Such is doubtless the logical, theoretical consequence of giving effect to the literal sweep of words, although the Board has never gone so far."

Mr. Cox here did not say that the Board *may not legally* go so far. He simply states that the Board *has not yet* gone so far. That is why the statement quoted from Mr. Cox's brief is eyebrow-raising.

One could draw similar "logical, theoretical" conclusions from the *dictum* in the last paragraph of the *Los Angeles Meat Drivers* case by giving "effect to the literal sweep of words" included in that terminal *dictum.* Mr. Justice Stewart's cautions and comments are relevant.

[10] *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965).

[11] *Local Union No. 189* v. *Jewel Tea Co.,* 381 U. S. 676 (1965).

> even if the union's activities are 'unilateral' in this sense, in order to be protected they must concern a subject 'intimately' related to matters of 'immediate and direct' union concern—wages, hours and working conditions—rather than to matters, such as prices, which have only indirect concern to the union. (Labor Relations Yearbook, 1965, Bureau of National Affairs, p. 119 at p. 122)."

Under each of the two tests or standards carefully and correctly culled from *Pennington* and *Jewel Tea* by Professor Handler, the petitioning unions here violated the Sherman Act. First, they did not act "unilaterally", in the sense defined by Professor Handler. They acted *in combination with non-labor groups* within the meaning of Mr. Justice White's language (281 U. S. at 690 and 281 U. S. 664-665). Second, the petitioning unions fixed minimum *prices* for musical services, a subject which was not "intimately related" to matters of "immediate and direct" union concern.

Even Mr. Justice Goldberg's opinion (on behalf of himself and Justices Harlan and Stewart) does not help petitioning unions. For Mr. Justice Goldberg, the scope of labor's immunity is coextensive with the duty of labor and management to bargain about wages, hours and working conditions. Petitioning unions never bargained with orchestra leader-employers; although one would scarcely understand this from the zealous manner in which, in their petition, they take up cudgels to defend collective bargaining. Mr. Justice Goldberg declined to concur in Mr. Justice White's opinion in *Jewel Tea* only because he understood the latter as rejecting the view that *all* agreements, "resulting from union-employer negotiations" on compulsory subjects of bargaining, are automatically exempt.

Mr. Justice White simply applied the *Allen-Bradley* rule when he said that there was no exemption for a union which joined an employer conspiracy or combination "to elim-

inate competitors from the industry" (381 U. S. at 665-666). Regardless of the involved antitrust violation, Mr. Justice Goldberg, on the contrary, indiscriminately gives automatic blanket exemption to agreements on mandatory subjects of bargaining and on matters intertwined with mandatory subjects of bargaining (381 U. S. at 714). *Taken on its facts, Allen-Bradley* involved a union *which organized the involved conspiracy or combination with employers.* In principle and in reason, the rule should be the same whether *employers take the intiative in fixing prices* in order to gain protection from a *labor contract* or whether a *union takes the initiative in fixing prices* (and in suppressing competition) to gain protection from a labor contract. The antitrust laws are equally violated in each case.

But *Pennington* goes beyond *Allen-Bradley* in stating that "from the viewpoint of antitrust policy * * * all * * * agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a * * * basic defect, without regard to predatory intention or effect in the particular case" (381 U. S. at 668). The Local 802 labor contracts with hotels, night clubs and restaurants suffer from this "basic defect".

CONCLUSION

The petition should be denied and the cross-petition granted.

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